IN THE

# Supreme Court of the United States

October Term, 1978

No. 77-1810

ARIZONA PUBLIC SERVICE COMPANY, EL PASO ELECTRIC COMPANY, SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT, SOUTHERN CALIFORNIA EDISON COMPANY, and TUCSON GAS & ELECTRIC COMPANY,

Appellants,

v.

ARTHUR B. SNEAD, Director of the Revenue Division of the Taxation and Revenue Department, REVENUE DIVISION OF THE TAXATION AND REVENUE DEPARTMENT, and STATE OF NEW MEXICO,

Appellees.

On Appeal From The Supreme Court of New Mexico

## BRIEF OF APPELLEES

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### OPINIONS BELOW

The Memorandum Opinion of the District Court of the First Judicial District, Santa Fe County, New Mexico, is not reported and appears in Appendix A of the Jurisdictional Statement. The Opinion of the Supreme Court of New Mexico is reported in *Arizona Public Service Co. v. O'Chesky*, 91 N.M. 485, 576 P.2d 291 (1978), and appears in Appendix B

of the Jurisdictional Statement. No other written opinions have been delivered.

## JURISDICTION

The opinion of the Supreme Court of New Mexico was issued and filed on March 23, 1978 (App. 3). The jurisdictional statement was filed in this Court on June 21, 1978, and the appeal was docketed on that date. This Court noted probable jurisdiction on October 10, 1978. The Court has jurisdiction under 28 U.S.C. § 1257(2).

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The appellants challenge the validity of the New Mexico Electrical Energy Tax, reprinted herein in relevant part in Appendix A, under the following constitutional provisions, set forth herein in pertinent part in Appendix B: The commerce clause, *U.S. Const.* art. I, § 8, cl. 3, the import-export clause, *id.*, art. I, § 10, cl. 2, and the due process clause. *Id.* amend. XIV, § 1. In addition, the appellants challenge the New Mexico tax under § 2121(a) of the Tax Reform Act of 1976, 90 Stat. 1914, 15 U.S.C. § 391, which is as follows:

> No State, or political subdivision thereof, may impose or assess a tax on or with respect to the generation or transmission of electricity which discriminates against out-of-State manufacturers, producers, wholesalers, retailers, or consumers of that electricity. For purposes of this section, a tax is discriminatory if it results, either directly or indirectly, in a greater tax burden on electricity which is generated and transmitted in interstate commerce than on electricity which is generated and transmitted in intrastate commerce.



## QUESTIONS PRESENTED

1. Does the New Mexico electrical energy tax discriminate against interstate commerce either under the commerce clause or under 15 U.S.C. § 391?

2. Does the New Mexico electrical energy tax violate either the due process clause of the 14th amendment or the import-export clause of the Constitution?

## STATEMENT OF THE CASE

This is a challenge to the validity of New Mexico's tax on the generation of electric power by several public utility companies which generate electricity in New Mexico and sell most of it in other states. The essential charge against the tax is that it discriminates against interstate commerce. The residents of New Mexico who consume electric power produced there pay, in fact, approximately twice as much tax on electricity as New Mexico charges those who transmit the power out of state. New Mexico achieves this result by way of a credit system of some intricacy which is the basis of the appellants' contention that the tax discriminates against interstate commerce. The details of the New Mexico tax, the nature of the appellants' production of electricity in New Mexico, the consequences of that production in New Mexico, and the proceedings in the lower courts are set out below.

Additionally, Congress enacted a statute, contained in the Tax Reform Act of 1976, which relates to state taxes on the generation and transmission of electricity in interstate commerce. While that Act will be alluded to in the statement of the case, a discussion of its legislative history is reserved to the argument portion of this brief.

A. *The New Mexico Generation Tax.*

The New Mexico statute, the Electrical Energy Tax Act of 1976, N.M. Stat. Ann. § 72-34-1, 1975 N.M. Laws § 1, (Appendix A of this brief) is deemed, "a tax on the generation of electricity."[1] The operative portion of the tax, § 3, imposes a tax of 4/10 of 1 mill on each net kilowatt hour of electricity generated in New Mexico. Expressed as a percentage of the average retail price of electricity generated by the appellants in New Mexico, the tax is imposed at a rate of less than 2%. Throughout the proceedings in the courts below, the 2% figure has been referred to as the measure for the rate of tax imposed by the Electrical Energy Tax (R. 986; App. 147 (Opinion of the New Mexico Supreme Court)). Appellants have never disputed this figure.

This 2% tax on generation applies to all electric power generated in New Mexico and consumed in New Mexico as well as to all electricity generated in New Mexico and consumed elsewhere. All generators of electricity are required to pay it. However, New Mexico also imposes a 4% gross receipts tax, equivalent to a sales tax, on all retail sales occurring within the state. N.M. Stat. Ann. §§ 72-16A-3(F),

[1]New Mexico was clearly bringing its generation tax within declared constitutional boundaries for such a tax as established by the Court in *Utah Power & Light Co. v. Pfost*, 286 U.S. 165, 52 S. Ct. 548, 76 L. Ed. 1038 (1932). In *Pfost*, the Court upheld a state tax on the generation of electricity, holding that the generation of electricity was essentially a local occurrence and that the commerce clause did not prevent a state from taxing its manufacture or creation. *Id.* at 181, 52 S. Ct. at 552. The Court also stated that although electricity, once generated, was almost immediately transmitted for eventual consumption, the generation of electricity constituted a separate operation from the transmission of electrical power. *Id.* at 179-81, 52 S. Ct. at 551-52. *See generally* R. 799 and 801.



72-16A-3(I), and 72-16A-4.[2] The legislative history surrounding the passage of the New Mexico generation tax clearly shows that the state legislature did not wish to increase the total tax burden on electricity, which would be passed through from the generators of electricity to the retail sellers of electricity to the consumers, beyond a 4% level. Consequently, when the New Mexico Legislature adopted the 2% generation tax it, in substance, reduced the sales tax on retail sales of electricity to consumers from 4% to 2%.

The precise method by which this reduction is achieved is contained in § 9 of the tax act. Under § 9(B), the New Mexico generator of electricity which is consumed within New Mexico is allowed a credit equal to the tax on generation imposed by § 3 against the state retail sales tax.

However, since the transaction between the generator of electricity and the first purchaser of electricity, the wholesale buyer,[3] is a wholesale transaction and is not subject to the retail sales tax, the generator of electricity is unable to apply this credit against the retail sales tax. The wholesale generator of power would undoubtedly pass along the generation tax to his wholesale buyer as a portion of the electricity's total cost. In turn, the wholesale buyer would further pass along the generation tax to his retail customers. This pass-through process would ultimately cause the New Mexico consumer to assume a total tax burden on electricity

[2]In addition to the 4% gross receipts tax (hereinafter referred to as a retail sales tax) New Mexico municipalities and counties are authorized to impose taxes on retail sales occurring within their boundaries. N.M. Stat. Ann. §§ 14-61-3, 15-55-1. Thus, as a result, in certain areas of New Mexico, the total tax on retail sales may be slightly greater than 4%.

[3]The wholesale buyer of electricity is also the retail seller of electricity.

greater than 4%. In order to prevent this, § 9(C) of the act provides that the credit established against the retail sales tax must be assigned to the wholesale buyer of electricity who then reimburses the wholesale generator of the electricity for the credit.

In sum, under the New Mexico generation tax, all generators of electricity, whether they generate electricity for final consumption in New Mexico or elsewhere, pay the 2% generation tax. The net functional effect of the credit/reimbursement provisions, taken as a whole, is to reduce the retail sales tax on electricity which must be paid by the New Mexico consumer to 2%. Thus, the *total* tax burden on the New Mexico consumer of electric power is 4%: Two percent is attributable to the state retail sales tax and 2% is attributable to the generation tax on electrical power which is ultimately passed down the distribution line from the wholesale generator to the electrical consumer. The clear purpose of the credit/reimbursement arrangement is to prevent the stacking or pyramiding of taxes on electricity which would have to be paid by the New Mexico consumer.

In an obvious effort to achieve equality, § 9(A) of the act also makes this same credit pattern applicable to electricity generated outside of New Mexico but consumed within New Mexico. In this situation, the amounts paid by a generator of electricity may be credited against the retail sales tax due New Mexico.

B. *The Production of Electricity in New Mexico and Its Consequences.*

Since there may be an argument as to the legitimacy of New Mexico's interest in taxing the production of electricity within its borders, a record has been made bearing on this point.



The electricity producing area of New Mexico is commonly referred to as the Four Corners area, the northwest corner of the state where the states of New Mexico, Arizona, Colorado and Utah meet. Two power plants have been constructed there. An abundant supply of low-cost coal is located nearby which is used to produce the electric power generated at these plants (R. 792). However, this is accomplished at a cost of considerable pollution. For example, emissions of particulates, sulphur dioxide, and nitrogen oxides from the generation plant at the Four Corners station amounted, in 1976, to approximately one-quarter billion pounds a year and created frequently hazy conditions (R. 823). The pollution has washed out the color quality of the landscape, has prevented the detection of features in the land, and has resulted in a general haze over the New Mexico vistas which have been historically known for their depth, clarity, and color (R. 822, 834, 916). What was once the brightest air in America has now become a sewer in the sky. In short, there is now smog over Four Corners (R. 834).

The power generated in the Four Corners area goes in very small part to New Mexico.[4] The bulk is transmitted to Arizona, Southern California, and Texas. If the appellants were unable to obtain or to generate electricity in New Mexico, they would have to increase their business costs by a minimum of one hundred and twenty-four million dollars a year in order to obtain an equivalent supply of electricity generated at their power plants located outside of New Mexico (R. 792).

[4]Approximately 80% of the electricity generated by the appellants at the Four Corners and San Juan generating plants is transported outside of New Mexico (R. 792).

The construction and operation of the generating plants has also caused the population to expand and has resulted in increased costs to local and state government. The record contains estimates of added costs and capital outlays of between 145 and 245 million dollars depending on various population projections (R. 848). Additionally, it has been projected that approximately 33 million dollars will be needed to make road improvements (R. 848-49). The annual costs to local governmental agencies which must expand to accommodate the increased population have been estimated as amounting to 24 to 40 million dollars (R. 849).

The generation of electricity in New Mexico by the appellants constitutes a significant portion of the electrical power furnished by them to their customers (App. 33, 41, 53, 59). In particular, two of the appellants, Arizona Public Service Company, and El Paso Electric Company, attribute over 35% of their aggregate generating capacity to power generated in New Mexico (App. 33 and 41). The total kilowatt hours produced by the appellants, for example, in July, 1975, were approximately 936,958,752 KWH. The generation tax owed by appellants on this electricity is approximately $376,697.90 (App. 38-39, 45, 56, 62).[5]

C. *Proceedings Below.*

After adoption of the New Mexico tax, the State of Arizona applied in this Court for leave to file an original action against New Mexico challenging the tax. This Court declined jurisdiction, preferring to have the matter come up through the New Mexico courts by direct appeal as has now happened.

[5]The appellants were allowed by the District Court of Sante Fe County to protest the New Mexico generation tax without payment (App. 39, 45, 56, 62, 69).



*Arizona v. New Mexico*, 425 U.S. 794, 96 S. Ct. 1845, 48 L. Ed. 2d 376 (1976). This Court noted that the essential problem was whether the credit provision of the New Mexico tax somehow discriminated against interstate commerce. The matter thereupon proceeded in the New Mexico state courts and considerable uncontroverted factual information was presented by all parties.

On cross-motions for summary judgment, the trial court, following the Washington Supreme Court's decision in *Public Utility District No. 2 of Grant County v. State*, 82 Wash. 2d 232, 510 P.2d 206, *appeal dismissed for want of substantial federal question*, 414 U.S. 1106, 94 S. Ct. 833, 38 L. Ed. 2d 734 (1973), found that the "whole scheme of taxation"[6] on the generation and sale of electricity in New Mexico imposed a total tax of 2% on electricity generated in New Mexico and transmitted in interstate commerce and a total tax of 4% on electricity generated in New Mexico and consumed in New Mexico and that, therefore, there was no discrimination against interstate commerce. The court stated that the functional effect of the credit/reimbursement provisions of the tax was to reduce the local retail sales tax on electricity to 2% and that this violated neither the commerce clause nor 15 U.S.C. § 391.[7] The Supreme Court of New Mexico,

[6]This phrase, and the approach to determining whether a state tax discriminates against interstate commerce which it describes, was adopted by the New Mexico District Court from the Washington Supreme Court's opinion in *Public Utility District No. 2 of Grant County v. State, supra.* That court, in turn, had adopted that phrase and that approach from several decisions of this Court which had analyzed state taxes. Notably, these decisions included *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64, 83 S. Ct. 1201, 10 L. Ed. 2d 202 (1963). See section III, *infra*.

[7]Section 391, as part of the Tax Reform Act of 1976, was passed by Congress in the midst of the proceedings before the New Mexico District Court. Appellants filed a motion for summary judgment be-

affirming, devoted fuller attention to 15 U.S.C. § 391. That court found that upon consideration of the entire tax structure of New Mexico there was no direct or indirect greater tax burden on electricity generated and transmitted to other states than on electricity generated and transmitted in New Mexico.

This appeal followed.

## SUMMARY OF ARGUMENT

15 U.S.C. § 391 prohibits any state or political subdivision of a state from imposing a "greater tax burden on electricity which is generated and transmitted in interstate commerce than on electricity which is generated and transmitted in intrastate commerce." The State of New Mexico has enacted a tax on the generation of electricity at a rate of 2%. The total tax burden imposed by New Mexico on electricity generated and transmitted within New Mexico is 4 to 4½%. The total tax burden imposed by New Mexico on electricity generated and transmitted in interstate commerce is 2%.

It really is that simple. As the record shows, one of the appellants, a principal Arizona utility, sought federal legislation which would invalidate the New Mexico generation tax. However, this utility was unable to obtain this result without also invalidating taxes on the generation of electricity imposed by other states whose senators would not support such legislation.

In consequence, the Arizona interest was compelled to settle for a statute, 15 U.S.C. § 391, which was simply

fore that court on September 15, 1976 (R. 328). The Tax Reform Act was signed by President Ford on October 4, 1976. Consequently, the appellants filed a supplemental motion for summary judgment bringing the passage of § 391 to the district court's attention (R. 737).



declarative of constitutional provisions concerning interstate commerce. The utility's lobbyist recognized this problem and attempted to obtain a legislative history to overcome the "dozen arguments" which he anticipated would reveal the truth of what had happened—that 15 U.S.C. § 391 was, in fact, sterile legislation.

The lobbyist obtained much legislative history. But, Congress does not pass legislative history, it passes laws. This law adds nothing to the constitutional test.

As a matter of constitutional law, the electrical energy tax does not discriminate against interstate commerce. Indeed, intrastate commerce is the subject of discrimination. Arguments concerning the due process clause of the 14th amendment or the import-export clause of the Constitution are especially inconsequential here because they are based on the same false premise of discrimination.

The New Mexico electrical energy tax is a manufacturing tax, a tax on the generation of electricity. It is applied to all generators of electricity within New Mexico and, were it not for this appeal, all generators would pay it. The tax is now being paid on electricity generated and transmitted within New Mexico. The fact that New Mexico, in substance, has reduced its retail sales tax to consumers on electricity is its privilege.

We deal here with the entire western power grid. If utilities importing electricity into New Mexico are subject to a generation tax on that electricity, the New Mexiço electrical energy tax allows these utilities to obtain the same credit against the retail sales tax applicable to electricity generated and sold within New Mexico.

New Mexico's interest is clear. The utilities are generating

electrical power in New Mexico from coal located near their generating plants. This New Mexico cannot stop; it can only endure the dirt, the pollution, and the enormous social costs resulting from the appellants' operations. Meanwhile, the utilities are able to sell the electricity, obtain millions of dollars from these sales, and supply distant communities, more populous than all of New Mexico, with "clean energy." New Mexico, however, is left to suffer the consequences. Clearly, the appellants' activities within New Mexico have given that state a substantial taxable nexus.

## ARGUMENT

### I. *Introduction.*

The appellants would have this Court believe that this case is simply a label case. Repeatedly, the appellants call the New Mexico tax on the generation of electricity discriminatory, and of course, describing the tax as discriminatory makes it invalid. The issues in this case, however, cannot be answered by resorting to labels. The hard decision presented by this appeal concerns the scope of the focus used to analyze the New Mexico generation tax. If one looks at only the New Mexico tax and credit provisions without taking into account the relationship of that tax to New Mexico's retail sales tax, then the tax may discriminate against interstate commerce. On the other hand if one focuses on the fact that the total tax burden imposed by the state of New Mexico on electricity consumed in New Mexico is 4% and the total tax burden imposed by New Mexico on electricity consumed elsewhere is 2% then, clearly, there is no discrimination against interstate commerce and if anything, there is reverse discrimination against intrastate commerce.



The problem in this case is to choose the focus. New Mexico rests fundamentally on the functional approach.

### II. *The Federal Statute Does Not Bar This Tax.*

During the debate in Congress on the measure which eventually became 15 U.S.C. § 391, the generation taxes of two states, Washington and West Virginia, were frequently compared and contrasted with the New Mexico tax. Senator Fannin of Arizona as a spokesman for one of the appellants, Arizona Public Service, sought federal legislation to invalidate the New Mexico tax. His initial efforts to draft a bill which would invalidate the New Mexico tax conflicted with views of senatorial titans representing the taxing interests of West Virginia and Washington. The result was that Senator Fannin's initial attempts to invalidate all state taxes on the manufacture or generation of electricity was watered down before becoming 15 U.S.C. § 391.

Whether the labor of the mountains brought forth a lion or a mouse is to be determined by this decision.

#### A. *The Legislative History.*

The New Mexico Electrical Energy Tax passed on April 10, 1975. In the spring of that same year, Senator Fannin introduced Senate Bill 1957, a measure which did not pass, but which became the grandfather of 15 U.S.C. § 391. The core portion of that bill, contained in § 2, prohibited the enforcement of any state tax "imposed on or with respect to the generation of electricity within such State, to the extent that such electricity is transmitted to and consumed outside of such State." S. 1957, 94th Cong. 1st Sess. § 2 (1975).

This measure clearly prohibited all manufacturing or generating taxes on electricity transmitted in interstate commerce. We do not pause with the controversy as to whether Congress had the power to adopt such a statute, because it did not pass.[8] Without doubt, this measure was directed, as expressly stated by Senator Fannin, at "New Mexico's recently enacted Electrical Energy Tax Act . . . ." 95 Cong. Rec. S 10729 (daily ed. June 17, 1975). At the hearing on Senate Bill 1957, Senator Fannin could not have been more explicit in explaining the purpose and effect of Senate Bill 1957: "Senate Bill 1957 prohibits State taxation on . . . the generation of electricity within a state to the extent that the electricity is transmitted to and consumed outside of the State. . . ." *State Taxation on the Generation of Electricity: Hearing on S. 1957 before the Subcommittee on Energy of the Committee on Finance*, 94th Cong., 2nd Sess. 5 (1976).

In making this far-reaching proposal, Senator Fannin, however, had reached further than the Senate would permit. The West Virginia tax as it then existed fell squarely upon the manufacture of electricity and would have been invalidated if Senate Bill 1957 had passed. *Id.* at 68-69.

Several utility companies which generated electricity in West Virginia for transmission to other states, accordingly, supported Senate Bill 1957. Representatives of these utilities

[8] In the interest of brevity, we have not reargued the question of the constitutionality of § 391 on the assumption that it does not in any event reach the New Mexico tax. However, we do not waive this point and, therefore, in the alternative, incorporate our argument as made in our Motion to Dismiss or Affirm at pages 17-19. The statute, as a single shot effort by Congress to invalidate the New Mexico generation tax is neither within Congress' power to regulate interstate commerce nor is a reasonable and appropriate device to reach any goal which the commerce clause allows. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 85 S. Ct. 348, 13 L. Ed. 2d 258 (1964).



asserted at the hearing that West Virginia's manufacturing tax discriminated against out-of-state consumers because electricity generated and taxed in West Virginia was also subject to sales taxes imposed in the states where the energy was finally sold. This, they contended, imposed a higher total tax burden on electricity sold out of state than on electricity sold within West Virginia. *Id.* at 32 and 65. These witnesses also testified that taxes on electrical energy, such as that imposed by West Virginia, would inhibit or discourage power companies from uniting and building power plants designed to service consumers located in other states. *Id.* at 83-84 and 67.

In close parallel to West Virginia, the State of Washington also imposed a manufacturing tax on electricity. Wash. Rev. Code Ann. § 82.04.240. The Director of the Washington State Department of Revenue submitted a statement to the subcommittee opposing Senate Bill 1957. In her statement, the Director explained that Senate Bill 1957 would discriminate in favor of utilities by exempting them from a manufacturing tax which everyone else in Washington paid, regardless of the fact that their products moved in interstate commerce. *Id.* at 79.

Not only was Senate Bill 1957 opposed by representatives of the States of West Virginia and Washington, but a representative of the State of New Mexico also spoke in opposition to the bill at the hearing:

> The [New Mexico] generation tax must be read together with the gross receipts tax. Receipts from the sale of electricity at retail in New Mexico are taxed at the minimum rate of 4 percent. In most populated areas the rate of the tax is 4-1/2 percent. For example in Santa Fe, the seller is taxed at 4 percent as a state gross receipts tax, one-fourth of 1 percent as municipal gross receipts tax and one-fourth of 1 percent as

a county gross receipts tax.

> The Electrical Energy Tax Act was designed to avoid pyramiding of taxation of electricity sold in New Mexico. The legislature provided that the electrical energy tax may be credited against the gross receipts tax. Indeed it provided that any generation tax, whether levied by New Mexico or a sister state, could be credited against the gross receipts tax. In this manner New Mexicans would not be forced to pay more than 4 1/2 percent tax on the electricity they consume. *Id.* at 43.

As a result of this opposition, Senate Bill 1957 never moved out of the Senate Finance Committee. One need not read deeply between the lines to perceive that the appellants were unable to obtain a bill achieving their desired objective over the opposition of Senators Byrd and Randolph of West Virginia and Senators Magnuson and Jackson of Washington. The task of the proponents of federal legislation, therefore, required the drafting of a bill which would walk between the perils, leaving the Washington and West Virginia taxes alone, but at the same time invalidating the New Mexico tax. The opportunity to make this effort came with § 1323 of the Tax Reform Bill of 1976, which, as it emerged from the Senate Finance Committee provided in pertinent part:

> SEC. 201(a) No State, or political subdivision thereof, may impose or assess a tax on or with respect to the generation of electricity for transmission in interstate commerce which is discriminatory against out of State manufacturers, producers, wholesalers, retailers or consumers of that electricity. For purposes of this section a tax is discriminatory that either directly or indirectly results in the payment of a higher gross or net tax on electricity which is generated and transmitted in interstate commerce than on electricity which is generated and transmitted in intrastate commerce. H.R. 10612, 94th Cong., 1st Sess. S. 1323 (1976).

Whereas Senate Bill 1957 had prohibited any tax on the



manufacture or generation of electricity to be transmitted in interstate commerce, this new proposal prohibited only such taxes as were "discriminatory against out-of-State" users. This required a definition of discrimination, and one was provided by the following language: "[A] tax is discriminatory that either directly or indirectly results in the payment of a higher gross or net tax on electricity which is generated and transmitted in interstate commerce than on electricity which is generated and transmitted in intrastate commerce." The Finance Committee report shows a purpose to strike down the New Mexico tax. S. Rep. No. 94-938, 94th Cong., 2nd Sess. 437-38, *reprinted in* [1976] *U.S. Code Cong. & Ad. News* 3439, 3865-67. Both New Mexico Senators, Domenici and Montoya, offered an amendment on the Senate floor to strike this version, but their efforts proved unsuccessful. 114 Cong. Rec. 512717 (daily ed. July 18, 1976).

The Tax Reform Act of 1976, containing § 1323 in the form described above, passed in the Senate on August 6, 1976. 121 Cong. Rec. S 13797 (daily ed. August 6, 1976).[9] The Tax Reform Act was sent to a conference committee composed of members of the House and Senate (including Senator Fannin). *Id.* at S 13799. The only significant change in § 1323 made by the conference committee was to the definition of discrimination. The language in the version of § 1323 passed by the Senate which had found a generating tax on electricity discriminatory if it resulted in a higher gross or net tax on electricity was omitted and the following carefully diluted language was substituted:

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[9]When passed by the Senate, § 1323, had been renumbered as § 1322. For purposes of this brief, however, it will be referred to as § 1323.

> [A] tax is discriminatory if it results, either directly or indirectly, in a greater tax burden on electricity which is generated and transmitted in interstate commerce than on electricity which is generated and transmitted in intrastate commerce.[10]

Our statutory question, therefore, is, does the New Mexico tax result "either directly or indirectly, in a greater tax burden on electricity which is generated and transmitted in interstate commerce" than on the same product generated and transmitted in intrastate commerce? We contend that the answer is No. While we have no doubt that Senator Fannin was seeking to invalidate the New Mexico tax, in avoiding the opposition of West Virginia and Washington he moved so far from his original objective as to defeat his purpose. Senator Fannin's initial attempt, contained in Senate Bill 1957, to invalidate the New Mexico tax became the subject of radical surgery designed to preserve West Virginia's and Washington's taxes on the generation of electricity, but to strike down New Mexico's. The result of that surgery was § 1323. However, in drafting § 1323, Senator Fannin was unable to wield his legislative scalpel with sufficient precision. Consequently, § 1323 became the subject of further surgery. The creation of this operation became 15 U.S.C. § 391, an innocuous statute which on its face merely reiterates the test of discrimination against interstate commerce developed by this Court. But, in working for the passage of 15 U.S.C. § 391, Senator Fannin, as advised by a lobbyist for one of the appellants, was able to orchestrate the legislative history. The lobbyist hoped this would obfuscate the actual language of the statute drafted as a result of congressional compromise and adjustment.

[10]The Tax Reform Act of 1976, containing section 1323, as amended by the Senate-House Conference Committee, was approved by both Houses of Congress on September 16, 1976. Both Houses also approved a concurrent resolution, H. Con. Res. 751, 94th Cong. 2nd Sess. (1976) which renumbered § 1323 as § 2121.



We realize that the lobbyist for Arizona Public Service Company received exactly what he asked for when we see his letter to Senator Fannin contained in the appendix at page 85. The lobbyist, fully recognizing the power of Senator Byrd, concluded that the phrase "gross or net" tax as contained in the version of § 1323 passed by the Senate would invalidate the West Virginia tax and thought that this hazard would be avoided by using the phrase "greater tax burden on electricity.

The representatives of West Virginia apparently considered the "gross or net" language fatal because their tax on the manufacture of electricity was on the gross proceeds of the electricity's sale and, as pointed out previously in this brief, the opponents of the West Virginia tax contended that it resulted in a higher total tax burden on electricity because local retail sales taxes were imposed on it in other jurisdictions. In consequence, the "gross or net" language played directly into the hands of those persons in West Virginia who were seeking to invalidate the West Virginia tax. The phrase "greater tax burden on electricity," charming for its imprecision, escaped the shibboleth quality which had been attached to "gross or net" by supporters of the West Virginia tax.

The trouble with all this is that it destroyed the bill. A tax on the generation of electricity in one state which is later retailed in another state subject to a sales tax will have a higher "net tax" than would be the case if there had been no generation tax. Hence, Arizona's utility lobbyist was compelled to throw in the sponge, insert an almost meaningless phrase in the statute, and aspire to a legislative history which would give a meaning where there was none. The utility's lobbyist made the instant problem clear when he

informed Senator Fannin, "[f]inally, it is imperative that a clear legislative history be made. Without it, we could probably dream up another dozen arguments that it does not apply to the generation tax in New Mexico."

We are left, in short, with a statute which the utility's lobbyist clearly recognized would not necessarily invalidate the New Mexico generation tax—there would be a "dozen arguments that it does not apply." Since they could not get the law they wanted, they sought to obtain a legislative history in its stead.[11]

This is a bold attempt to nullify the legislative process by substituting a legislative history, which the utility could control, for an actual statute which it could not control. This is a manipulation which cannot succeed. Legislative history can clarify a statute, *Train v. Colorado Public Interest Research Group*, 426 U.S. 1, 96 S. Ct. 1938, 48 L. Ed. 2d 434 (1976); *United States v. Donruss Co.*, 393 U.S. 297, 89 S. Ct. 501, 21 L. Ed. 2d 495 (1969), but it cannot change it. See *Gemsco v. Walling*, 324 U.S. 244, 65 S. Ct. 605, 89 L. Ed. 921 (1945), where this Court rejected a party's attempt to contradict the terms of a statute by reference to legislative history:

> The argument from the legislative history undertakes, in effect, to contradict the terms [of the statute] by negative inferences drawn from inconclusive events occurring in the course of consideration of the

[11] In fact, the appellants may not even have actually obtained the legislative history they wanted. With respect to the meaning of the phrase "greater tax burden" contained in 15 U.S.C. § 391, the legislative history is singularly silent. There is absolutely no discussion in the legislative history or Senate debate on 15 U.S.C. § 391 concerning how the test incorporated in that section changed or modified the constitutional test for discrimination against interstate commerce.



> various and widely differing bills which finally, by compromise and adjustment between the two Houses of Congress, emerged from the conference as the Act. The plain words and meaning of a statute cannot be overcome by a legislative history which, though strained processes of deduction from events of wholly ambiguous significance, may furnish dubious bases for inference in every direction. *Id.* at 260, 65 S. Ct. at 614-15.

*See also Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 91 S. Ct. 814, 28 L. Ed. 2d 136 (1971) (when legislative history is ambiguous, court must look primarily to statute to find legislative intent).

Congress does not pass legislative history, it passes laws. This law passed by Congress does not invalidate the New Mexico tax.

We do not need a "dozen arguments" that 15 U.S.C. § 391 does not invalidate New Mexico's tax. Instead, only one is necessary—and, simply, that argument is that New Mexico's tax does not result, either directly or indirectly, in a greater tax burden on electricity generated and transmitted in interstate commerce than on electricity generated and transmitted in intrastate commerce.

### B. *The Generation Tax Does Not Impose a Greater Tax Burden on Electricity Generated and Transmitted in Interstate Commerce.*[12]

As has been detailed above, the total tax burden imposed

[12] Section 391 precludes a tax which "is discriminatory . . . directly or indirectly." Appellants make nothing of the term "indirectly" and we do not dwell on it. This is because the tax challenged is the New Mexico tax on the generation of electricity, and there could not be any more a direct tax than this; there is no element of indirection in the tax from either point of view. Whether there is discrimination, "directly," "indirectly," or not at all, depends upon how the Court will evaluate the reduction of the New Mexico sales tax on electricity.

by New Mexico on electricity generated and transmitted within that state is 4%. All electricity generated and transmitted in New Mexico is subject to the generation tax and this tax is passed down the line of distribution from the wholesale generator to the ultimate consumer. The credit/reimbursement provisions of § 9 of the tax, considered as a whole, reduce the retail sales tax on electricity which must be paid by the New Mexico consumer to 2%. Thus, the total tax burden on electricity generated and transmitted in New Mexico is 4%: 2% is attributable to the state retail sales tax and 2% is attributable to the generation tax on electrical power. In contrast, the total tax burden imposed by New Mexico on electricity generated and transmitted in interstate commerce is only 2%.

In attempting to sustain their argument that the New Mexico tax imposes a greater burden on interstate commerce in spite of these facts, appellants contend that since the language of § 391 speaks of "*a tax* on or with respect to the generation or transmission of electricity," consideration may only be given to the New Mexico generation tax and not to the manner in which this tax fits into the total scheme of taxation imposed by New Mexico on the generation of electricity. Appellants' argument, however, is plainly inconsistent with their own analysis of the New Mexico tax and is clearly contrary to the express language of 15 U.S.C. § 391.

Throughout their brief, appellants have asserted that the credit/reimbursement provisions of § 9 cause a greater tax burden to be imposed on electricity generated and transmitted in interstate commerce than on electricity generated and transmitted in intrastate commerce. In order for appellants to sustain this argument they must examine the operation of the credit/reimbursement provisions by taking into account the wholesale and retail taxes on electricity imposed



by New Mexico.[13] In short, they must regard the "scheme as a whole." They must take "the whole scheme of taxation into account." *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64, 69, 83 S. Ct. 1201, 1204, 10 L. Ed. 2d 202 (1963).

Appellants must look not merely to the tax on generation (which is imposed on all generators of electricity at the 2% rate), but must look to the tax "on electricity generated and transmitted in interstate commerce," which is precisely what the federal statute commands. Once we look to the tax on electricity, we must look to the entire tax on electricity. Appellants cannot pick out the particular provisions of the tax on which they rely and omit all those provisions relating to electricity which harms their claim. By taking the New Mexico tax into account, as a whole, the tax imposed by New Mexico on the generation and transmission of electricity is 4%, while the tax imposed by New Mexico on the generation and transmission of electricity sold elsewhere is only 2%. The "greater tax burden" rests on the intrastate and not on the interstate generation and transmission of electricity.[14]

Had Senator Fannin's original attempt to invalidate all state taxes on the generation of electricity passed, as contained

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[13] The credit/reimbursement provisions of § 9 are contained in the gross receipts and compensating tax provisions of the New Mexico statutes. N. Mex. Stat. Ann. §§ 72-16A-1 and 72-16A-16.1. Thus, simply as a matter of construction, the New Mexico generation tax and the credit/reimbursement provisions contained in § 9 of the Electrical Energy Tax Act must be examined along with the wholesale and retail taxes on electricity imposed by New Mexico for their operation to make any sense.

[14] The test for discrimination under 15 U.S.C. § 391 is whether a tax imposes a *greater or larger* burden on interstate commerce, not whether a tax imposes an *additional* burden. While the appellants are now subject to a generation tax on electricity which they were not required to pay before passage of the New Mexico tax, payment of the tax does not impose a greater or larger tax burden on electricity transmitted out-of-state. All generators are required to pay the New Mexico tax.

in Senate Bill 1957, there would have been a tremendous substantive change in the law on this subject; *Utah Power & Light Co. v. Pfost* would have been overruled. However, the statutory language actually passed by Congress contains only a declaration that no state may pass a tax which imposes a greater burden on the generation and transmission of electricity in interstate commerce than on intrastate commerce. This statute is declarative of current constitutional principles with respect to the commerce clause. Appellants' entire argument that the statute goes farther than this is based on legislative history which representatives of the appellants could control and which, by way of embroidery, goes farther than the sponsors of 15 U.S.C. § 391 could obtain in the statutory language.

We therefore face the question of the constitutional principles which apply.

III. *The New Mexico Tax is Valid Under the Commerce Clause.*

The commerce clause of the United States Constitution, as this Court has recognized, restricts the power of the states to regulate interstate commerce. *Boston Stock Exchange v. State Tax Commission,* 429 U.S. 318, 97 S. Ct. 599, 50 L. Ed. 2d 514 (1977). Nevertheless, this Court has also repeatedly recognized that the commerce clause does not "eclipse the reserved 'power of the States to tax for the support of their own governments.' " *Id., quoting Gibbons v. Ogden,* 22 U.S. (9 Wheat.) 1, 199, 6 L. Ed. 23 (1824). The mere fact that a person carries on business in interstate commerce does not exempt that person from state taxation. As this Court has stated, it was not the purpose of the commerce clause to relieve those engaged in interstate commerce from carrying a fair share of the costs of state government in



return for the benefits they have received from the state. *Complete Auto Transit, Inc. v. Brady,* 430 U.S. 274, 97 S. Ct. 1076, 1083, 51 L. Ed. 2d 326 (1977); *Colonial Pipeline Co. v. Traigle,* 421 U.S. 100, 108, 95 S. Ct. 1538, 1543, 44 L. Ed. 1 (1975); *Northwestern States Portland Cement Co. v. State of Minnesota,* 358 U.S. 450, 462, 79 S. Ct. 357, 364, 3 L. Ed. 2d 421 (1959).

Therefore, interstate commerce is not immune from state taxation. Moreover, under appropriate circumstances, a state may even directly tax the privilege of conducting interstate business. *Department of Revenue of the State of Washington v. Association of Washington Stevedoring Companies,* 98 S. Ct. 1388, 1396 (1978).

Today, we live with the following test with respect to state taxes:

> [T]he tax is applied to an activity with a substantial nexus with the taxing state, is fairly apportioned, does not discriminate against interstate commerce and is fairly related to the services provided by the State. *Complete Auto Transit, Inc. v. Brady,* 97 S. Ct. at 1079.

*Accord, Department of Revenue of the State of Washington v. Association of Washington Stevedoring Companies,* 98 S. Ct. at 1389; *Colonial Pipeline Co. v. Traigle,* 421 U.S. at 108, 95 S. Ct. at 1543; *General Motors Corp. v. Washington,* 377 U.S. 436, 84 S. Ct. 1564, 12 L. Ed. 2d 430 (1964); *Northwestern States Portland Cement Co. v. State of Minnesota,* 357 U.S. at 357-63, 79 S. Ct. at 362-65.

Under this test, a state tax may not discriminate against interstate commerce. Discrimination, in the context of the commerce clause generally covers two separate, although closely related situations. First, discrimination against interstate

commerce occurs when a state tax provides a direct commercial advantage to intrastate businesses over interstate businesses. *Boston Stock Exchange v. State Tax Commission,* 97 S. Ct. at 607; *Northwestern States Portland Cement Co. v. State of Minnesota,* 358 U.S. at 458, 79 S. Ct. at 362; *see Halliburton Oil Well Cementing Co. v. Reily,* 373 U.S. 64, 70, 83 S. Ct. 1201, 1204, 10 L. Ed. 2d 22 (1963) (state tax will discriminate against interstate commerce unless equal treatment is provided for in-state as well as out-of-state taxpayers who are similarly situated). A state tax which causes this effect is prohibited because

> [p]ermitting the individual States to enact laws that benefit local enterprises at the expense of out-of-state businesses 'would invite a multiplication of preferential trade areas destructive' of the free trade which the Clause protects. *Boston Stock Exchange v. State Tax Commission,* 97 S. Ct. at 607, *quoting Dean Milk Co. v. Madison,* 340 U.S. 349, 356, 71 S. Ct. 295, 299, 95 L. Ed. 329 (1951).

Second, a state tax will also discriminate against interstate commerce if that tax restrains or encourages people to trade only within the taxing state.

> A State may no more use discriminatory taxes to assure that nonresidents direct their commerce to businesses within the State than to assure that residents trade only in intrastate commerce. As we stated at the outset, the fundamental purpose of the Clause is to assure that there be free trade among the several States. This free trade purpose is not confined to the freedom to trade with only one State; it is a freedom to trade with any State, to engage in commerce across all States' boundaries. *Boston Stock Exchange v. State Tax Commission,* 97 S. Ct. 609.

Both of these aspects of discrimination often comprise the opposite sides of the same coin. A state tax which



provides a commercial advantage to local commerce over interstate commerce would, simultaneously, encourage people to trade only within the taxing state. Thus, in finding that a state's particular tax measure discriminated against interstate commerce, the Court has normally found both of these effects to be present. *Boston Stock Exchange v. State Tax Commission,* 97 S. Ct. at 607-10;[15] *Halliburton Oil Well Cementing Co. v. Reily,* 373 U.S. at 72, 83 S. Ct. at 1205.[16]

In determining whether a state tax discriminates against interstate commerce, the Court has repeatedly emphasized that it will look at the practical operation or effect of the state tax and not to its formal language. *Complete Auto Transit, Inc. v. Brady,* 97 S. Ct. at 1079 (Court's decisions have considered practical effect of state tax, not formal language of tax); *Halliburton Oil Well Cementing Co. v. Reily,* 373 U.S. at 69, 83 S. Ct. at 1204 (proper analysis must take "the whole scheme of taxation into account," quoting *Galveston, H. & S. A. R. Co. v. Texas,* 210 U.S. 217, 227, 28 S. Ct. 638, 640, 52 L. Ed. 1031 (1908)); *Nelson v. Sears, Roebuck & Co.,* 312 U.S. 359, 363, 61 S. Ct. 586, 588, 85 L. Ed. 888 (1941) (in determining the constitutionality of a tax law, the court is concerned only with the statute's practical operation and not with its

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[15] In this case, the Court invalidated a New York statute which encouraged people to trade on the New York Stock Exchange and discouraged them from trading on stock exchanges located in other states.

[16] In *Halliburton Oil Well Cementing Co.,* the state of Louisiana imposed a use tax on manufacturers of equipment who brought equipment assembled by them in another state into Louisiana for their own use there. However, in-state manufacturers of equipment who used the equipment manufactured by them within Louisiana were not subject to the use tax. The court found that application of the Louisiana use tax in this situation discriminated against interstate commerce.

definition or the precise form of descriptive words which may be applied to it).

We are thus left with three propositions: First, interstate commerce must pay its own way. Second, a state tax must not provide a commercial advantage to intrastate commerce over interstate commerce or encourage people to trade only within the taxing state. Third, in determining whether a state tax presents one of these situations and discriminates against interstate commerce, the whole scheme of the state's tax must be considered.

### A. *The New Mexico Tax Does Not Discriminate Against Interstate Commerce.*

Utilities generating electricity for consumption within New Mexico are subject to the same generating tax as utilities generating electricity for sale elsewhere. In analyzing appellants' contention that the New Mexico tax discriminates against interstate commerce, we present three hypotheticals.

In the first hypothetical, suppose New Mexico imposed a tax on the generation of electricity equal to 2%, and did not impose a sales tax on the retail sale of electricity. In this situation, the generation tax would apply equally to all generators of electricity at a 2% rate, and under *Utah Power & Light v. Pfost,* 286 U.S. 165, 52 S. Ct. 548, 76 L. Ed. 1038 (1932), the tax would clearly be constitutional. The fact that New Mexico failed to impose a retail sales tax on electricity would not make the generation tax discriminatory.

In the second hypothetical, assume that New Mexico imposed a 2% tax on the generation of electricity *and* a 2% sales tax on all retail sales of electricity. In this situation, as in the first hypothetical, the generation tax would be



constitutionally valid because it would apply to all generators of electricity. Consumers in New Mexico would have a total tax burden on the generation and transmission of electricity equal to 4% (the 2% generating tax plus the 2% sales tax on retail sales of electricity).

Finally, in the third "hypothetical," suppose New Mexico enacted a 2% tax on the generation of electricity and a 4% sales tax on its retail sale. However, assume further that New Mexico allowed a credit against the sales tax equal to the 2% tax paid on the generation of electricity. New Mexico did this so that New Mexico consumers would have only a total tax burden on electricity equal to 4%, and not one greater than 4%.

As can be seen, the third "hypothetical" describes the actual operation of the New Mexico Electrical Energy Tax. In its actual effect it is no different from the tax in the second hypothetical which is obviously constitutionally valid.

These three hypotheticals clearly demonstrate that by looking at the net functional effect of the New Mexico tax, that tax does not discriminate against interstate commerce. The credit/reimbursement provisions of the tax only reduce the retail sales tax on electricity which must be paid by consumers in New Mexico. These provisions do not, as contended by appellants, eliminate the generation tax on electricity consumed in New Mexico. Appellants, through their characterization of the tax, have elevated form over substance.

As we have noted in the statement of the case, New Mexico wished to tax the generation of electricity without increasing the local tax on electricity sold in New Mexico. Therefore, in practical effect, New Mexico reduced the sales tax on electricity from 4% to 2%, thus, leaving the total tax

on electricity at the same 4% level which had existed before (2% attributable to the generation tax and 2% attributable to the retail sales tax). Mechanistically, New Mexico achieved this result by giving the New Mexico wholesale generators a credit against the retail sales tax equal to the generation tax paid. Since the wholesale generators were unable to use this credit, New Mexico permitted them to pass the credit along to the retail sellers of electricity. The retail sellers would then reimburse the generators of the electricity for the credit they received. The thrust of the appellants' argument is that when electricity is generated in New Mexico and marketed by a generator at a wholesale level for consumption in New Mexico, the wholesaler receives a credit while the wholesaler of electricity to be consumed elsewhere does not. While this is true, it is purely a matter of form; the credit system is simply the device for reducing the retail sales tax on electricity. *All* generators of electricity are required to pay the generation tax.

This Court, in evaluating state taxes challenged under the commerce clause, has pierced the form of a state tax in order to analyze the practical effects of that tax. In *State of Alaska v. Arctic Maid,* 366 U.S. 199, 81 S. Ct. 929, 6 L. Ed. 2d 227 (1961), Alaska imposed a license tax on the business of operating "freezer ships" in Alaska's commercial fisheries. The frozen fish went to Washington where they were canned. No tax was imposed on fish caught and frozen in Alaska and destined for canning in Alaska. Fish canned in Alaska, however, were not usually frozen and, instead, Alaskan canners paid a 6% tax on the value of fish obtained for canning. In upholding the tax on freezer ships, the Court, looking at the aggregate taxes paid in Alaska, found that they were substantially higher than those on freezer ships. The Court held there was no discrimination:



> For no matter how the tax on 'freezer ships' is computed, it did not exceed the six-percent tax on the local canners. Hence cases such as Commonwealth of Pennsylvania v. State of West Virginia, 252 U.S. 553, 595-596, 43 S. Ct. 658, 664-665, 67 L. Ed. 1117, which hold invalid state laws that prefer local sales over interstate sales, are inapposite. If there is a difference between the taxes imposed on these freezer ships and the taxes imposed on their competitors, they are not so 'palpably disproportionate' (*International Harvester Co. v. Evatt,* 329 U.S. 416, 422, 67 S. Ct. 444, 447, 91 L. Ed. 390) as to run afoul of the Commerce Clause. No 'iron rule of equality' between taxes laid by a State on different types of business is necessary. *Id.* at 204-05, 81 S. Ct. at 932.

As in *Alaska v. Arctic Maid,* the aggregate taxes imposed by New Mexico on the generation and transmission of electricity in New Mexico is substantially greater than the taxes imposed by New Mexico on the generation and transmission of electricity in interstate commerce. Thus, there is no discrimination.

*See also South Carolina Power Co. v. South Carolina Tax Commission,* 52 F.2d 515 (E.D. S.C.), *aff'd*, 286 U.S. 525, 52 S. Ct. 494, 76 L. Ed. 1268 (1931), in which South Carolina, like New Mexico, had a tax on the generation of electricity and a retail sales tax on electrical sales, and gave a credit against the sales tax for the amount paid under the manufacturing tax. A utility which imported electricity into South Carolina for sale and was, therefore, not subject to the South Carolina manufacturing tax and, hence, could not claim the South Carolina credit, contended that the tax discriminated against interstate commerce. The court, recognizing that a state could control its taxes and could credit one tax against another, said

> The evident purpose of the act is to impose a tax upon the current used within the state and to impose it at the

source or as soon as the current becomes subject to the jurisdiction of the taxing power, but not to impose it but once. If current produced as well as sold within the state were subjected to the sales tax, such current would rest under a double burden of taxation. To avoid this and at the same time to preserve the system of taxing at the source, current which is produced within the state is taxed at the time of generation but is relieved of the sales tax, which is equal in amount, with the result that all current sold within the state, whether produced there or brought in from another state, pays exactly the same tax. 52 F.2d at 521.

Reasoning similar to that used by this Court in *Alaska v. Arctic Maid* and by the court in *South Carolina Power Co.* was used by the Washington Supreme Court in *Public Utility District No. 2 of Grant County v. State,* 82 Wash. 2d 232, 510 P.2d 206, *appeal dismissed for want of a substantial federal question,* 414 U.S. 1106, 94 S. Ct. 833, 38 L. Ed. 2d 734 (1973). This case was expressly relied on by both the District Court and the Supreme Court of New Mexico. In this case, two Washington public utility districts which generated electricity for wholesale sold their electricity to Washington and Oregon utilities for resale to their customers. Washington imposed a tax on the light and power business measured by gross income. A deduction from gross income was allowed for amounts received from the sale of electricity to other public utilities if the electricity would be resold within Washington. The public utility districts contended that the tax discriminated against interstate commerce because the amounts they received on the sale of electricity to the Oregon utilities were included within gross income while the amounts they received from the sale of electricity to the Washington utilities were excluded from gross income.[17]

[17]The Washington tax system on electricity described by the Court in its opinion essentially parallels the New Mexico tax system. Under both systems, a credit or deduction is allowed against another tax. The only difference between these two systems is that in Washington the deduction actually lessened the tax paid by the utilities which made wholesale sales of electricity destined for resale within Washington. Under the New Mexico tax, the credit/reimbursement provisions do not lessen the generating tax which must be paid by utilities generating electricity for intrastate consumption. This credit only operates to reduce the retail sales tax on electricity which must be paid by the consumer.



The Washington Supreme Court upheld the tax and stated:

> [R]ather than having an interrelated tax structure (manufacturing-wholesaling) imposed, this case has a shifting tax structure in which singular tax liability exists but shifts to another utility. By so doing, the in-state distribution of the use of power is *not* exempted and is taxed, just as is the out-of-state distribution of power. Equal treatment is the theme of this system. The out-of-state utility is in no worse position than its in-state competitor. The state is playing no favorite with its resident business at the expense of similarly situated out-of-state enterprises. 510 P.2d at 211. (Citation omitted, emphasis in original.)

As in *Public Utility District No. 2 of Grant County v. State,* 82 Wash. 2d 232, 510 P.2d 206, *appeal dismissed for want of substantial federal question,* 414 U.S. 1106, 94 U.S. 833, 38 L. Ed. 2d 734 (1973), the generation of electricity consumed within New Mexico is subject to the generation tax. Utilities generating electricity for transmission within New Mexico must pay the generation tax just the same as utilities generating electricity for transmission elsewhere.

This Court's decision on this issue must rest on the practical and functional effect of New Mexico's total tax structure on electricity. Applying this standard, no serious criticism can be made of the New Mexico tax. The credit/reimbursement provisions of the tax do not exempt generators producing electricity for consumption within New Mexico from

paying the electrical energy tax. The State's tax structure is designed to tax the generation of electricity, but to do so only once.

B. *Utilities Which Operate in New Mexico and Generate and Transmit Electricity in Interstate Commerce Must Pay Their Own Way.*

We have earlier cited the statements of this Court that interstate commerce must pay its own way and we now refine and apply that concept here. As the Court stated in *General Motors Corp. v. Washington*, 377 U.S. 436, 84 S. Ct. 1564, 12 L. Ed. 2d 430 (1964), a case involving the constitutionality of a privilege tax measured by gross receipts:

> [T]he validity of the tax rests upon whether the State is exacting a constitutionally fair demand for that aspect of interstate commerce to which it bears a special relation. For our purposes, the decisive issue turns on the operating incidence of the tax. In other words, the question is whether the State has exerted its power in proper proportion to appellant's activities within the State and to appellant's consequent enjoyment of the opportunities and protection which the State has afforded. Where, as in the instant case, the taxing State is not the domiciliary State, we look to the taxpayer's business activities within the State, i.e., the local incidents, to determine if the gross receipts from sales therein may be fairly related to those activities. *Id.* at 440-41, 84 S. Ct. at 1568.

See also *Northwestern States Portland Cement Co. v. State of Minnesota*, 358 U.S. 450, 79 S. Ct. 357, 3 L. Ed. 2d 421 (1959), and *Department of Revenue of the State of Washington v. Association of Washington Stevedoring Companies*, 98 S. Ct. 1388 (1978) containing this Court's most recent expression of authority to tax interstate activities with "an obvious nexus" in the taxing state.

We have, in our statement of the case, recited in a neutral



tone the consequences to New Mexico caused by the appellants' production of electricity within its borders. In argument, we may be less passive. The plain truth is that we are dealing with an environmental tragedy. The appellants, serving the population centers to the east and west of New Mexico, have found they can generate electricity in New Mexico for far less than what they would have to pay to generate it elsewhere. All of this serves quite nicely the states to which the electricity generated by the appellants is transmitted for their clean air is not fouled. The generation of electricity in the Four Corners area of New Mexico has polluted an area which had once been one of America's most scenic and remote areas. This Court need not evaluate the enormous problems caused by the social trade-off involved in balancing the pollution caused by the production of electricity against consumer needs to conclude that New Mexico has a very real interest in the production of electricity within its borders. New Mexico's "nexus" is both aesthetic and financial. As the appellants go marching out of New Mexico with millions of dollars worth of electricity, they cannot disclaim their responsibilities to the people of that state.

C. *The New Mexico Generation Tax and Other State Taxes.*

No serious argument can be made that a tax on the generation of electricity is invalid merely because the power eventually moves in interstate commerce. *Utah Power & Light Co. v. Pfost*, 286 U.S. 165, 52 S. Ct. 548, 76 L. Ed. 1038 (1932). Appellants contend, therefore, that the New Mexico tax creates an improper prospect of multi-state taxation.

Whatever multiplication there may be, by definition, there can only be one tax placed on the generation of electricity

because there can only be one state of generation. Thus, the appellants' argument is that because electricity may be taxed by other states, electricity generated in New Mexico and transmitted to these states may be subject to multiple tax burdens. Whereas there may be a four percent tax ceiling on electricity in New Mexico the effect of these other states' taxes may be to subject electricity generated in New Mexico and transmitted into these states to a higher tax burden than on electricity consumed in New Mexico. But, it is not enough to invalidate a state tax because "an incidental or consequential fact of the tax is an increase in the cost of doing the business. . . ." *McGoldrick v. Bernwind-White Coal Mining Co.*, 309 U.S. 33, 46, 60 S. Ct. 388, 392, 84 L. Ed. 565 (1940). *See also Public Utility District No. 2 of Grant County v. State*, 82 Wash. 2d 232, 510 P.2d 206, 209, *appeal dismissed for want of substantial federal question*, 414 U.S. 1106, 94 S. Ct. 833, 38 L. Ed. 2d 734 (1973) (state tax does not burden interstate commerce merely because it may be passed on to out-of-state consumers).

Finally, appellants contend that the New Mexico tax is similar to the tax invalidated by this Court in *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157, 74 S. Ct. 396, 98 L. Ed. 583 (1954). However, the tax invalidated in that case was found to be on the actual transmission of natural gas in interstate commerce. Additionally, the Court distinguished *Utah Power & Light Co. v. Pfost*, stating that *Pfost* involved a tax on the generation of electricity produced in one state and transmitted to another. 347 U.S. at 168, 74 S. Ct. at 402. As recognized in both *Pfost* and *Michigan-Wisconsin Pipe Line Co.*, such a tax is constitutional. The New Mexico generation tax does not extend beyond the generation of electricity and the credit/reimbursement provisions



only operate to reduce the amount of sales tax which must be paid by consumers in New Mexico.[18]

IV. *The New Mexico Tax Does Not Violate the Due Process Clause or the Import-Export Clause.*

We combine the minor arguments.

A. *The Due Process Clause.*

Appellants contend the due process clause of the fourteenth amendment imposes a geographic limitation upon the permissible exercise of a state's taxing power. With this we do not disagree. See *Moorman Manufacturing Co. v. Bair*, 98 S. Ct. 2340 (1978). However, appellants further assert that the New Mexico tax only applies to consumers in other states and, therefore, represents an attempt by New Mexico to project its taxing power beyond its own borders. This argument goes far wide of the mark.

The New Mexico tax is a tax on the generation of electric power in New Mexico; it is neither more nor less. The taxable occurrence for all electricity generated in New Mexico is at the time the electricity is generated. In fact, until the voltage of the generated electricity is later transformed in preparation for transmission, the particular market in which it will be distributed cannot be identified (App. 35, 42, 54, 60, 67). Thus, application of the generation tax is not dependent upon where the electricity is ultimately transmitted. Rather, the tax is applied only upon the actual generation of electricity within New Mexico.

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[18] In *Department of Revenue of the State of Washington v. Association of Washington Stevedoring Companies, supra*, the Court reaffirmed that the tax in *Michigan-Wisconsin Pipe Line Co.* was invalid because it amounted to an unapportioned tax on the interstate transportation of natural gas. *Id.* at 1399, n.18.

It is perfectly true that the tax was constructed, in relation to the New Mexico retail sales tax, in such a way as to not increase the total tax burden on electricity paid by New Mexico consumers to more than 4%. Adjusting the tax burdens which must be assumed by its residents is classical state business. Whatever vices a state tax may have, if any, it is elementary that each state may tax its residents and that each state may raise or lower particular taxes. The power to tax is an incident of state sovereignty. *See Boston Stock Exchange v. State Tax Commission*, 429 U.S. 438, 97 S. Ct. 599, 606 (1977) (commerce clause has not eclipsed the reserved power of the states to tax to support their own governments).

B. *The Import-Export Clause.*

Since a portion of the power generated by one of the appellants in New Mexico is transmitted to the Republic of Mexico, the appellants contend that the New Mexico tax violates the import-export clause. It might be fairly arguable that if electricity in transmission to the Republic of Mexico were taxed, such a tax would be invalid under recent authorities refining the meaning of the import-export clause. See *Department of Revenue of the State of Washington v. Association of Washington Stevedoring Companies*, 98 S. Ct. 1388 (1978); *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 96 S. Ct. 535, 46 L. Ed. 2d 495 (1976). A state tax applicable to goods in transit will be invalidated under these authorities if the tax constitutes an impost or duty within the meaning of the import-export clause. We need not discuss whether the New Mexico generation tax is an impost or a duty, however, because that tax is only on the generation of electricity and is imposed at the time the electricity is generated in New Mexico. It is not a tax on electricity in transit



to the Republic of Mexico.

Appellants' argument that the New Mexico tax imposes a discriminatory burden upon electricity transmitted to Mexico is singularly inapposite here because there is no showing that the Republic of Mexico to which the power is exported has any sales tax of its own. It may be possible to argue that when electricity is "exported" to Arizona or California, the generating tax in New Mexico combined with the sales taxes in these two states may result in a larger cost to consumers than in New Mexico where the aggregate tax on electricity is limited to 4%. When the electricity is transmitted to the Republic of Mexico, this is not true, and the total tax imposed by New Mexico on the generation of electricity transmitted in interstate or in foreign commerce is 2%. Electricity generated and transmitted within New Mexico is taxed at exactly that same rate. This can scarcely be called discrimination.

## CONCLUSION

It is respectfully submitted that the decision of the Court below should be affirmed.

Respectfully submitted,

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## APPENDIX A

Pertinent Provisions of the New Mexico Electrical Tax Act.

### CHAPTER 263

### AN ACT

RELATING TO TAXATION; IMPOSING A TAX ON THE GENERATION OF ELECTRICITY; AMENDING SECTIONS 45-2-28 and 72-13-24 NMSA 1953 (BEING LAWS 1939, CHAPTER 47, SECTION 28 AND LAWS 1965, CHAPTER 248, SECTION 12, AS AMENDED); ENACTING A NEW SECTION 72-16A-16.1. NMSA 1953. BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

. . .

Section 3. Imposition of Tax—Rate—Denomination as electrical energy tax.—A. For the privilege of generating electricity in this state for the purpose of sale, whether the sale takes place in this state or outside this state, there is imposed on any person generating electricity a temporary tax, applicable until July 1, 1984, of four-tenths of one mill ($.0004) on each net kilowatt hour of electricity generated in New Mexico.

B. The tax imposed by this section shall be referred to as the "electrical energy tax." [§ 72-34-3, NMSA 1953 (1975 P.S.)]

Section 4. Measurement and recording of kilowatt hours of electricity.—Persons subject to the imposition of the electrical energy tax shall maintain accurate measuring devices and records to measure and record the daily and cumulative monthly and yearly totals of kilowatt hours of electricity generated or distributed in this state. [§ 72-34-4, NMSA 1953 (1975 P.S.)]

Section 5. Reports—Remittances.—Every person subject to the imposition of the electrical energy tax shall file a return on forms provided by and with the information required by the bureau and shall pay the tax due on or before the twenty-fifth day of the second month following the month in which the taxable event occurs. [§ 72-34-5, NMSA 1953 (1975 P.S.)]

. . .

Section 9. A new Section 72-16A-16.1 NMSA 1953 is enacted to read:

"72-16A-16.1. Credit—Gross receipts tax.—A. If on electricity generated outside this state and consumed in this state, an electrical energy tax or similar tax on such generation has been levied by another state or political subdivision thereof, the amount of such tax paid may be credited against the gross receipts tax due this state.

B. On electricity generated inside this state and consumed in this state which was subject to the electrical energy tax, the amount of such tax paid may be credited against the gross receipts tax due this state.

C. The credit under Subsections A or B of this section shall be assigned to the person selling the electricity for consumption in New Mexico on which New Mexico gross receipts tax is due, and the assignee shall reimburse the assignor for the credit."



## APPENDIX B

Provisions of the United States Constitution Involved in this Appeal.

1. Article I, § 8, cl. 3:

"[Congress shall have power] To regulate Commerce with foreign Nations, and among the several States . . . ."

2. Article I, § 10, cl. 2:

"No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its Inspection Laws . . . ."

3. Amendment XIV, § 1:

"No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."